No. 96-816

(2)

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

IN THE

Supreme Court of the United States

October Term, 1996

BRIAN T. HEADY, *et ux.*, aka HEADY ELECTRIC CO.,

Petitioner,

against

BARCLAYS BANK OF NEW YORK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS,
STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GELLERT & CUTLER, P.C.
Attorneys for Respondent
Barclays Bank of New York, N.A.
75 Washington Street
Poughkeepsie, NY 12601
(914) 454-3250

LILLIAN S. WEIGERT
Counsel of Record

THE REPORTER CO., INC.- Walton, NY 13856 - 800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202 - 315-426-1235
NYC Office - 30 Vesey St., New York, NY 10007 - 212-732-6978 - 800-800-4264
(2764 – 1996)
Printed on Recycled Paper

36 pp

Question Presented

1. Whether this Court has jurisdiction to consider Petitioner's arguments and whether the writ of certiorari should be denied since:

   (i) No federal question is presented and there is no decision on the merits by New York State's highest Court; this is a properly decided state law case of default and collection of a bank loan;

   (ii) Appellant lacks standing to assert and represent the claims of other necessary parties;

   (iii) Appellant did not comply with this Court's letter directive, dated October 10, 1996; and

   (iv) Appellant omitted and misstated pertinent record facts, prior proceedings and governing state law statutes and cases in the petition?

Statement Pursuant to Rule 29.6

A listing of parent companies or non-wholly owned subsidiary companies of respondent, Barclays Bank of New York, N.A. is set forth below:

Barclays PLC
Barclays Bank PLC
Barclays Corp.
Fenchurch Corp.
Baroreo I Corp.
Baroreo II Corp.
Barclays New Jersey Corporation
Baroreo Lloyd Corp.

Table of Contents

Page

Question Presented i

Statement Pursuant To Rule 29.6 i

Table Of Contents ii

Table Of Citations iv

Statement Of Jurisdiction v

Statement Of The Case 1

A. Decisions And Opinions Below 1

B. Course Of Proceedings And Disposition Of The Case Below 3

C. Correction Of Misstatements In The Petition 5

Reasons For Denying The Writ 9

I. This Court Has No Jurisdiction To Consider Petitioner's Arguments 9

II. In Any Event, New York State Law Was Correctly Applied 10

Conclusion 11

Respondent's Appendix

A. Barclays Bank Of New York, N.A., v. Heady Electric Company, Inc., *et al.*, 174 AD 2d 963 (3d Dept.), appeal dismissed, 78 NY 2d 1072 (1991) A1

B. Statement Of Questions Presented To The Appellate Division By The Heady Defendants On Appeal From Judgment, Resulting In February 27, 1995 Decision And Order (See A. App. 3) A7

C. Uniform Commercial Code 9-503 ..... A9

Table of Citations

Page

Cases Cited:

Adams v. Southern California First Nat'l. Bank, 492 F.2d 324 (9th Cir. 1973), *cert. den.*, 19 U.S. 1006 10

Barclays Bank of New York, N.A. v. Heady Electric Co., *et al.*, 174 A.D.2d 963 (3d Dept.), appeal dismissed, 78 N.Y.2d 1072 (1991) 2

Carden v. Arkoma Associates, 494 U.S. 185 (1990) 9

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 10

Rowland v. California Men's Colony, 506 U.S. 194 (1993) 9

Winfield v. Society Nat'l. Bank, 845 F.2d 328 (6th Cir. 1988) 10

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Statutes Cited:

28 U.S.C. §1257(a) v

Uniform Commercial Code 9-503 ..... 6, 10

Statement of Jurisdiction

This Court does not have jurisdiction over this matter, 28 U.S.C. §1257(a). No federal question is presented, and in any event, the purported federal questions were neither presented nor passed upon during the state court trial and appeals on the merits.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Barclays Bank of New York, N.A. ("Barclays") respectfully requests the Court to dismiss or deny the petition for writ of certiorari to review an order dated March 26, 1996, which dismissed a motion for leave to appeal to the New York Court of Appeals against Heady Electric Co., Inc. ("HEC") and Coral A. Heady and otherwise denied the motion as to the remaining appellant, Brian T. Heady, as well as the June 28, 1996 order denying reargument of such motion.

STATEMENT OF THE CASE

A. Decisions and Opinions Below

The order of the New York Court of Appeals, dated March 26, 1996, dismissed a motion for leave to appeal as to HEC and Coral A. Heady on the grounds that Brian T. Heady is not an attorney and was not their authorized legal representative and upon the further ground that HEC, a New York corporation, must appear by attorney. As to Brian T. Heady, without reaching the merits, leave to appeal was summarily denied (A. App. 4).

The order of June 28, 1996 (A. App. 5) denied a motion for reargument of leave to appeal and likewise did not address the merits.

The decision and order of New York's Appellate Division, (Second Judicial Department), which the Heady appellants attempted to bring on appeal to the New York Court of Appeals, is dated February 27, 1995 (A. App. 3-4). It is a unanimous affirmance of a judgment against HEC, the borrower, and Brian T. Heady and Carol A. Heady, guarantors, entered after a non-jury trial to recover on promissory notes. No federal constitutional issue was raised by the Heady defendants in the six

questions submitted on the appeal to the Appellate Division. (See the Heady defendants' Statement of Questions, Respondents A-7.)

The decision following trial, dated August 13, 1992, is reproduced at A. App. 1-2. As can be seen, no constitutional question was raised or decided at trial.

Further, before trial, there was an interim appeal with respect to the issue of waiver of jury trial, among other things. This decision is reported at *Barclays Bank of New York, N.A. v. Heady Electric Co., et al.*, 174 A.D.2d 963 (3d Dept.), *appeal dismissed*, 78 N.Y.2d 1072 (1991). No constitutional questions were raised on this appeal; rather, the issue was whether the borrower and guarantors had *knowingly* waived the right to jury trial by contract.

In particular, the Appellate Division examined each of Heady's contentions as to the enforceability of the jury waiver (none of them constitutional) and ruled that:

> Between December 1983 and July 1985, Heady executed six secured notes and two personal guarantees in connection with the funds and line of credit extended to his company by plaintiff. Each of these documents contained a clause waiving the right to a jury trial in any litigation where plaintiff was an adverse party. In opposing plaintiff's motion to strike, however, [the Heady] defendants argued that Heady was allegedly unaware of the waiver provisions in the documents and, therefore, should not be bound by them. Supreme Court denied plaintiff's motion, ruling that the waiver provisions in the various notes and agreements were ineffective. We disagree. As a general proposition, contract

> provisions waiving a jury trial are valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party . . . The right to a jury trial may even be waived in an instrument other than that . . . representing the agreement upon which the action is founded. Here, defendants have set forth no adequate basis to set aside the waivers.

The court continued:

> Heady testified that either he or his attorney read all documents to be signed. Moreover, even if Heady had neglected to read the documents containing the waiver provisions, this alone would not affect their validity . . . Although defendants contend that the waivers were actually buried in the small print of lengthy documents, a review of these papers reveals that each of these documents is only one page long and the waiver clause, printed in the same size type as the rest of the document (see supra), appears only a few lines above Heady's signature. Accordingly, defendants' claim that the waiver provision was hidden in the various agreements lacks merit . . . (citations omitted), Id. at 965 (Respondent's A-1).

As can be seen, no state court below was presented with nor passed on a federal question.

B. Course of Proceedings and Disposition of the Case Below

Petitioner, Brian T. Heady, seeks to prolong this torturous eleven year state court contract litigation by, at this late date, attempting to interpose constitutional claims that were never

timely or properly presented or passed upon, and which are without foundation, rest on obviously false assumptions, and have been explicitly foreclosed by previous decisions of holding self-help repossession to be constitutionally valid.

This was a suit to collect on two promissory notes, brought by Barclays against HEC and the two individual guarantors, Brian T. Heady and Coral A. Heady, for the remaining principal balance due of approximately $169,000.00, plus interest and attorneys' fees pursuant to the terms of the notes and guarantees.

Between December 1983 and July 1985, the Heady defendants executed *six* secured notes and *two* personal guarantees in connection with the funds extended by Barclays. *All* of these transactions expressly provided that Barclays was allowed to declare a default and accelerate repayment of the loan upon failure of either monetary or non-monetary provisions of the parties' agreements, or in the event Barclays deemed itself insecure. Mr. and Mrs. Heady and HEC were represented by counsel in their transactions with Barclays; indeed that attorney testified at trial.

In December, 1985, Barclays declared a default and accelerated the notes because of HEC's failure to comply with non-monetary terms of the notes and because Barclays deemed itself insecure. Significantly in November, 1985, the bank had learned that HEC's real estate collateral to Barclays was in foreclosure by *another party*. Although Carol A. Heady owned other real estate and multiple closings were scheduled, Brian T. Heady would not permit replacement of real estate collateral to take place. A promised equity infusion of $100,000 into HEC had not been made. HEC had lost its primary source of business, International Business Machines Corp. ("IBM"). A substantial judgment of $48,830.11 had been entered against Mr.

Heady by his brother in late November 1985. Pertinent business and financial information had been withheld from Barclays. At trial, these facts were confirmed, not only by a bank officer, but by non-party witnesses and the Headys' *own* accountant, lawyer and previous major customer, IBM.

When Barclays, on at least three occasions, offered to continue financing HEC so long as, at a minimum, it provided adequate replacement real estate collateral (which Carol A. Heady owned), defendants did not accept such offers--determining instead to simply let the business go. The Headys' attorney stated at trial that he had understood the risks and explained them to Mr. Heady. Barclays reduced the indebtedness by setting off HEC's accounts maintained at Barclays and repossessing and selling at auction HEC property pursuant to the parties' agreements.

The trial judge and appellate court relied on the ample documentary evidence and credible testimony to establish that the Heady defendants were in default of their notes and guarantees and that the repossession and sale of collateral conformed to the parties' agreements and applicable state law, the points raised and passed upon below.

C. Correction of Misstatements in the Petition

Decisions of the trial court and the Appellate Divisions correctly set forth the pertinent facts of this case.

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of facts contained in the petition to the Court's attention. These points are addressed to set the record straight—none of these points, even as misstated in the petition, confer jurisdiction.

Petitioner misrepresents that the self-help commercial repossession was conducted under a falsified court order. Mr. Heady raised this wild claim at trial and on appeal to the Appellate Division as a matter of state law. His contention was rejected. The private document of seizure states on its face that the repossessor is acting at the request of the lender to repossess the collateral pursuant to agreement. It further states that:

1. the seizure is authorized by Uniform Commercial Code ("UCC") 9-503;

2. the seizure is pursuant to self-help repossession (not court directed); and

3. that the party is contractually bound to surrender the property.

The repossessor also handed Brian T. Heady copies of the underlying security documents and did not say it was a court order. He advised Mr. Heady to call an attorney, which Mr. Heady did several times.

Mr. Heady also misrepresents that the police participated in the repossession or were somehow tricked by Barclays. To the contrary, a private repossession service performed the repossession as an independent contractor for Barclays. There was no testimony by any police officer at trial, let alone that a police department was "tricked" into permitting the repossession. There was no testimony that the police ever mistook the repossession document for a court order. The repossessor did advise local police that a self-help repossession was scheduled.

In this regard, the transcript of a purported conversation between one Thatcher and Heady, attached as Exhibit A to the

affidavit of Brian T. Heady, April 20, 1996 (Appellants' Appendix) was neither proffered nor admitted in evidence. Thatcher was not called as a witness. In any event, in the transcript, Thatcher does not state that the document was signed by a judge, or that he was "tricked".

Indeed, when Mr. Heady called the police to ask the repossession service to leave, that is exactly what happened—they left. The trial judge noted this. Further, Mr. Heady as his own testimony showed at trial, helpfully pointed out to the repossession service what collateral was covered by Barclays' security agreements and participated in the process.

It is true that the head of the repossession company was licensed to and did carry a firearm. There was no false showing of authority, such as a badge, in connection with the weapon. Indeed when asked, he explained it was regular procedure to protect the collateral. No criminal charges were brought against the repossession company or Barclays.

Defendants asserted below, as matters of state law, that the repossession service's use of a piece of paper prepared by the repossession service and authorizing it, as recovery agent to conduct the seizure, constituted a crime, violated the UCC and along with other alleged (but not proven) conduct, constituted a breach of the peace.

In dismissing such claims on the *facts* under New York law, the trial judge held there was no breach of the peace and specifically noted:

> The fact that [the repossessor] had a piece of paper that said order of seizure, the fact that he had a gun—the gun wasn't used to threaten anybody, Mr. Heady did have

> access to his attorney, he couldn't get, certainly he could have got him by the next day or even the day after because this took place over three days, and it was by the third day Mr. Heady then closed down and asked Mr. Simoniette to leave, and what did Mr, Simoniette do? He left. There wasn't any trouble. When Mr. Heady said get out, he went. So, I don't understand and do not feel that these four counterclaims can survive when they all are dependent upon whether or not illegal means were used to repossess the items. *The court determines as an issue of fact these items were not repossessed illegally*, and therefore, counterclaims seven, eight, nine and ten are dismissed, and you have an exception to the court's ruling [emphasis added].

The petition also misrepresents the facts as to the lack of adequate collateral. Indeed, critical to defendants' uncontradicted default and Barclays' decision to accelerate and setoff was defendants' failure to provide adequate collateral. Meetings and phone calls took place in the Fall of 1985 due to Barclays' concerns about the status of the loan. Certain property, which was to have secured this loan, was in foreclosure and the loss of real estate collateral was not resolved by the Heady defendants. A prior lien on property had not been released. No closing of replacement security occurred. The July 31, 1985 note matured on March 31, 1986; Barclays was not paid by the borrower. Indeed, no tender of payment was made. In addition, contrary to the assertions in the petition, no order of attachment was sought or required, and all state courts had the required and complete evidentiary records before them.

REASONS FOR DENYING THE WRIT

I

This Court Has No Jurisdiction to Consider Petitioner's Arguments

No federal question was raised in the pleadings, at trial, or in the two appeals to New York's Appellate Divisions, which were the only state appeals to decide issues on the merits. When the Heady defendants attempted to reach the New York Court of Appeals, their requests to do so were declined. That Court has never ruled on the merits of the case.

There is only one petitioner here, Brian T. Heady as explained at page ii of the petition. Carol A. Heady does not appear *pro se* within the text of the petition and does not have counsel of record. Petitioner Brian T. Heady is not an attorney and cannot represent another purported party. Likewise Heady Electric Co., Inc., a New York corporation, may not appear in federal court other than through a licensed attorney, *Rowland v. California Men's Colony*, 506 U.S. 194 (1993) (corporations may not appear in federal court other than through a licensed attorney); *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) (persons represented by a corporate name can appear only by an attorney —they are not really parties to the suit).

Further, when the New York Court of Appeals dismissed the Heady defendants motion for leave to appeal, insofar as Brian T. Heady purported to bring the motion on behalf of Carol A. Heady and HEC, it grounded its decision on the fact that HEC, as a corporation, did not have counsel as required under New York law and that Mr. Heady, who is not an attorney, could not represent Mrs. Heady.

Here, of course, Mr. Heady also cannot assert the purported legal rights of other necessary parties. In this regard, by letter dated October 10, 1996, the Office of the Clerk of this Court reminded Mr. Heady that "it does not appear as though you are a member of the bar of this court, therefore you may not represent a company or corporation in this Court".

No federal question was either raised or decided on the merits in any court below. Nowhere in appellant's papers does he specify the portions of the record, in the court of first instance or on appellate review, where the purported federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts. This is because such review did take place. Indeed, questions 5, 6 and 7 of the petition only serve to confirm this, namely, that as stated by petitioner, only state law questions are raised.

Therefore, the petition should be dismissed, *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing state court judgments, the court refuses to consider claims that were not raised or addressed below).

Further, private self-help repossession under UCC 9-503 has consistently been held to be constitutionally sound, *Winfield v. Society Nat'l Bank*, 845 F.2d 328 (6th Cir. 1988); *Adams v. Southern California First Nat'l. Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. den.*, 419 U.S. 1006; cf, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

II

In Any Event, New York State Law Was Correctly Applied

As the trial court found upon review of the credible evidence and the Appellate Division unanimously affirmed, the notes and guarantees were in default and the repossession and public auction sale fully complied with the contracts and state law requirements.

The New York courts correctly applied New York commercial law, on the facts of this case, as shown in the decisions below.

Conclusion

For all of the foregoing reasons, the petition should be dismissed, or the writ of certiorari denied.

Respectfully submitted,

LILLIAN S. WEIGERT
Counsel of Record for Respondent
Barclays Bank of New York, N.A.
GELLERT & CUTLER, P.C.
75 Washington Street
Poughkeepsie, NY 12601
(914) 454-3250

Appendix A—*Barclays Bank of New York, N.A. v. Heady Electric Company, Inc., et al.*, 174 AD 2d 963 (3d Dept.), appeal dismissed, 78 NY 2d 1072 (1991

(963) 17 *Barclays Bank of New York, N.A.*, Appellant, v *Heady Electric Company, Inc., et al.*, Respondents.—Harvey, J. Appeal (transferred to this court by order of the Appellate Division, Second Department) from an order of the Supreme Court (Jiudice, J.), entered September 5, 1990 in Dutchess County, which *inter alia,* partially granted plaintiff's motion for summary judgment.

On December 30, 1983, defendant Heady Electric Company, Inc., by its president, defendant Brian T. Heady (hereinafter Heady), executed a secured note in favor of plaintiff in the amount of $150,000. Heady and his wife, defendant Coral A. Heady, also executed a guarantee agreement in conjunction with this transaction. The proceeds of this note and the others that followed were rolled over and eventually consolidated in a note executed on July 31, 1985 in the amount of $340,130. Under the terms of the note and the accompanying commitment letter, plaintiff was allowed to declare default and accelerate repayment of the loan upon the happening of certain specified events. In December 1985, although interest payments were timely and the notes had not matured, plaintiff deemed itself insecure due to the financial condition and conduct of Heady and his company, declared default and (964) accelerated repayment of the loan. In an attempt to reduce the outstanding principal balance due on the notes, plaintiff set off certain accounts and repossessed and sold at auction the collateral belonging to Heady's company.

Plaintiff commenced this action in January 1986 seeking to recover the outstanding balance due on the loans, amounting to approximately $185,000. Defendants answered and asserted 11 counterclaims and three affirmative defenses. These counter-

claims and defenses chiefly concerned allegations by defendants that plaintiff acted improperly in seizing and disposing of defendants' collateral and assets following plaintiff's declaration of default. Defendants also sought $1,487,000 in actual damages and $50,000,000 in punitive damages. In November 1989, plaintiff moved for summary judgment dismissing defendants' affirmative defenses, counterclaims and claims for punitive damages, and, further, brought a separate motion to strike defendants' demand for a jury trial on the basis that defendants had allegedly waived that right. Supreme Court denied plaintiff's motions in all respects except that the court dismissed the individual claims for punitive damages. Supreme Court did, however, leave the request for punitive damages in the ad damnum clause. This appeal by plaintiff followed.

Initially, plaintiff contends that Supreme Court erred in denying its motion to strike defendants' demand for a jury trial. Between December 1983 and July 1985, Heady executed six secured notes and two personal guarantees in connection with the funds and line of credit extended to his company by plaintiff. Each of these documents contained a clause waiving the right to a jury trial in any litigation where plaintiff was an adverse party. In opposing plaintiff's motion to strike, however, defendants argued that Heady was allegedly unaware of the waiver provisions in the documents and, therefore, should not be bound by them. Supreme Court denied plaintiff's motion, ruling that the waiver provisions in the various notes and agreements were ineffective.

We disagree. As a general proposition, contract provisions waiving a jury trial "are valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party" (*Fordham Univ. v Manufacturers Hanover Trust Co.*, 145 AD2d 332, 333; *see Armstrong Co. v Nechamkin*, 55 AD2d 520). The right to a jury trial may even be waived "in an instrument other than that representing the agreement upon which the action is

founded" (*Franklin Natl. Bank v. Capobianco,*25 AD2d 445). Here, defendants have set forth no (965) adequate basis to set aside the waivers. Heady testified that either he or his attorney read all documents to be signed. Moreover, even if Heady had neglected to read the documents containing the waiver provisions, this alone would not affect their validity (*see, James Talcott, Inc. v Wilson Hosiery Co.*, 32 AD2d 524, 525). Although defendants contend that the waivers were actually buried in the small print of lengthy documents, a review of these papers reveals that each of these documents is only one page long and the waiver clause, printed in the same size type as the rest of the document (*see, supra*), appears only a few lines above Heady's signature. Accordingly, defendants' claim that the waiver provision was hidden in the various agreements lacks merit (*see, Kimi Jewelers v Advance Burglary Alarm Sys.*, 161 AD2d 273). As for defendants' contention that they should not be bound by the waivers because their counterclaims largely sound in intentional tort, as opposed to breach of contract, this argument must fail because, unlike the situation presented in *Cohn v. Adler* (139 AD2d 481, 482), the claims contained in defendants' various counterclaims are actually based on plaintiff's alleged violation of various provisions of the underlying agreements. Inasmuch as the claims asserted are tied to the loan agreements, Supreme Court erred in denying plaintiff's motion to strike the jury demand.

Next, the parties dispute the validity of provisions contained in the various agreements providing for the waiver of defendants' right to interpose setoffs and counterclaims. Plaintiff contends that Supreme Court erred in not strictly enforcing these waivers and dismissing all of defendants' affirmative defenses and counterclaims. This argument has some merit. It must be remembered, however, that although "[a] waiver of the right to assert a setoff or counterclaim is not against public policy", the enforceability of such provisions depends on the nature of the

claims involved (*Federal Deposit Ins. Corp. v Marino Corp.*, 74 AD2d 620; *see, European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905, 906; *Marine Midland Bank v CMR Indus.*, 159 AD2d 94, 104; *Bayside Fuel Oil Depot Corp. v Savino Oil & Heating Co.*, 133 AD2d 658, 659).

For example, a waiver provision will not be enforced to bar a viable setoff or counterclaim sounding in fraud or one which is based upon the creditor's negligence in failing to liquidate collateral upon the guarantor's demand (*see, European Am. Bank v Mr. Wemmick, Ltd., supra,* at 906-907; *Marine Midland Bank v CMR Indus., supra,* at 104; *Federal Deposit Ins. Corp. v Marino Corp., supra,* at 620-621). Further, although a (966) waiver limiting a creditor's responsibility as to collateral may not be enforceable, the creditor may not use such a provision to shield itself from liability if it breaches "the secured party's duty to use reasonable care in the custody and preservation of collateral" (*Marine Midland Bank v CMR Indus., supra,* at 104). It is beyond cavil that "[a] secured party's duty to act with due diligence, reasonableness and care may not be disclaimed by agreement" (*supra*).

Applying these principles to the matter at hand, it is our view that only defendants' first and second affirmative defenses alleging violations of UCC 9-503 and 9-207, respectively, and defendants' fifth, seventh, eighth, ninth and tenth counterclaims, also alleging UCC violations and sounding in fraud, survive enforcement of the waiver clause. Supreme Court erred in not dismissing the remaining counterclaims and affirmative defense. As for plaintiff's contention that any surviving counterclaims should be dismissed on summary judgment grounds, we cannot agree. Defendants' motion papers raise triable issues of fact concerning, among other things, whether plaintiff and its agents utilized reasonable care in the custody, preservation and disposal of the seized collateral (*see,* UCC 9-207) and whether these entities violated the self-help provision contained in UCC 9-503.

Because these and other issues raised cannot be resolved on the papers as a matter of law, their resolution must await trial. (*see,* CPLR 3212[b]).

Nevertheless, although we agree with Supreme Court that certain of the counterclaims interposed by defendants should stand, we find no basis for the denial of plaintiff's motion to strike defendants' request for punitive damages from the ad damnum clause. Although it is true that punitive damages can be recovered in fraud claims (*see, Chase Manhattan Bank v Perla,* 65 AD2d 207, 211), here, even assuming that plaintiff did indeed act in a wanton, willful or malicious manner as defendants allege, defendants allege only private wrongs; they " '[do] not seek to vindicate a public right or deter morally culpable conduct' " (*Quail Ridge Assocs. v Chemical Bank,* 162 AD2d 917, 921, *lv dismissed* 76 NY2d 936, quoting *Halpin v Prudential Ins. Co.,* 48 NY2d 906, 907). Accordingly, Supreme Court erred in failing to grant plaintiff's motion in this respect in its entirety.

The remaining arguments raised by the parties have been examined and found to be unpersuasive. In our view, Supreme Court properly denied plaintiff's motion for summary judgment with respect to defendants' liability in the main action. (967) Defendants' opposition papers and the exhibits attached thereto adequately assert defendants' position that there was no reasonable basis on which plaintiff could have deemed itself "insecure" or concluded that defendants' financial responsibility had "become impaired". Because this proof sufficiently raised questions of fact concerning the reasonableness of plaintiff's declaration of default, a trial is necessary (*see, Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank,* 135 AD2d 102, 109).

Mahoney, P. J., Levine, Mercure and Crew III, JJ., concur. Ordered that the order modified, on the law, without costs, by reversing so much thereof as denied plaintiff's motion for

summary judgment dismissing defendants' third affirmative defense, first through fourth, sixth and eleventh counterclaims and the claim for punitive damages, and denied plaintiff's motion to strike defendants' jury demand; said motions granted to that extent, said defense and claims dismissed, and jury demand stricken; and, as so modified, affirmed.

Appendix B—Statement of Questions Presented to the Appellate Division By The Heady Defendants On Appeal From Judgment, Resulting In February 27, 1995 Decision And Order (See A. App. 3)

STATEMENT OF QUESTIONS

1. Did the plaintiff use a false and fraudulent document (i.e. an "Order of Seizure") which purported to be judicial process in order to convince the defendants and police that the repossession was court ordered in violation of Penal Law 190.50, and did the plaintiff offer "Order Of Seizure" for filing in violation of Penal Law 175.30, and in violation of the Uniform Commercial Code?

2. Did plaintiff convert property of defendants not covered by security agreements with defendants while displaying a weapon which acts constitute criminal larceny pursuant to Penal Law 160.10 and / or 155.30, and 155.55 and / or 155.45 and in violation of the Uniform Commercial Code?

3. Did plaintiff breach the peace because it trespassed upon another's real property in violation of Penal Law 140.05, and break and enter the field office of defendant seizing it and its furniture and equipment contents even though it did not have a security interest in this property, all in violation of the Uniform Commercial Code?

4. Did the plaintiff damage defendants property during and after the repossession, and generally conduct itself in a way that the value of the collateral was diminished due to abusive conduct, or gross disregard, or mishandling, or outside storage of electrical equipment, all in violation of the Uniform Commercial Code?

5. Did plaintiff fail to hold, protect and dispose of the collateral in a commercially reasonable manner as required by the Uniform Commercial Code, performing its obligations to the parties mutual best advantage?

6. Was plaintiff justified in declaring the defendant in default on December 31, 1985 as alleged, and did the lower court improperly restrict testimony thus impeding defendants defense by not allowing testimony and witnesses which if allowed would have concluded that Barclays did not conduct itself in a manner consistent with what a reasonable and prudent person would have done in the same circumstances?

Appendix C—Uniform Commercial Code 9-503

UCC 9-503 "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504."